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November 25, 1997

By Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

NOV 25 1997

Re: Opposition of
the Telecommunications Resellers Association
to BellSouth's Application for "In-Region", InterLATA
Authority in the State of Louisiana
CC Docket No. 97-231

Dear Ms. Salas:

Pursuant to the Public Notice, DA 97-2330, (released November 6, 1997), transmitted herewith, on behalf of the Telecommunications Resellers Association ("TRA"), are an original and eleven (11) copies of TRA's Opposition, and a 3½" diskette containing TRA's Opposition in WordPerfect for Windows 5.1 format.

If you should have any questions concerning this matter, please do not hesitate to contact the undersigned.

Respectfully submitted,

Marie E. Kelley

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Legal Assistant

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Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
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OFFICE OF THE SECRETARY

In The Matter of	)	
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APPLICATION OF BELLSOUTH CORPORATION, BELLSOUTH TELECOMMUNICATIONS, INC. AND BELLSOUTH LONG DISTANCE, INC. FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN LOUISIANA	)	CC Docket No. 97-231

OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS RESELLERS ASSOCIATION

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November 25, 1997

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SUMMARY

The Telecommunications Resellers Association ("TRA"), a trade association representing more than 650 entities engaged in, or providing products and services in support of, telecommunications resale, hereby respectfully urges the Commission to deny the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively "BellSouth") for authority to provide interLATA service "originating" within the BellSouth "in-region State" of Louisiana. BellSouth has failed not only to satisfy the threshold requirements set forth in Section 271(c) for Bell Operating Company provision of "in-region," interLATA service, but has not demonstrated that grant of the authorization it seeks would be consistent with the public interest, convenience and necessity, as required by Section 271(d)(3)(C). Among the deficiencies which preclude grant of the BellSouth Application are the following:

- BellSouth has not satisfied the threshold requirements of Section 271(c)(1). The carrier cannot proceed under "Track A" because it has not shown that it is facing actual facilities-based competition; providers of wireless service were not intended by Congress to be included in the universe of potential facilities-based competitors because they were not previously precluded from market entry and moreover, personal communications service does not constitute a meaningful commercial alternative to wireline local exchange service. BellSouth is precluded from proceeding under "Track B" because it has received multiple qualifying requests for network access/interconnection from carriers which individually or in combination intend to serve both business and residential users using their own facilities or network elements obtained from BellSouth on an unbundled basis.

- BellSouth has not fully satisfied the 14-point "competitive checklist".

    - BellSouth unlawfully excludes from those services made available for resale at wholesale rates selected services which are essential to successful resale of local exchange service in competition with an incumbent LEC, including such critical offerings as contract service arrangements and voice messaging.

    - BellSouth has not demonstrated that its OSS interfaces and functionalities are adequately sized, have been sufficiently tested and are commercially viable.

- BellSouth has proposed to charge separately for vertical features that are encompassed within the local switching element in contravention of Commission determinations to the contrary.

- BellSouth has failed to detail how it will make unbundled network elements available so that they may be readily combined by requesting carriers and to demonstrate why the restrictions it imposes on requesting carriers' combination of unbundled network elements are not discriminatory.

- Deficiencies in BellSouth's OSS functionalities render access to unbundled network elements and wholesale service offerings inadequate

■ BellSouth has evidenced a clear intent to disregard Commission policies and rules with which it disagrees.

■ BellSouth has not demonstrated that the public interest would be served by its entry into the "in-region," interLATA market prior to the emergence of meaningful facilities-based local exchange/exchange access service alternatives.

■ The Commission may properly consider in its public interest analysis BellSouth's refusal to make available to new market entrants existing combinations of network elements

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OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Public Notice, DA 97-2330 (released November 6, 1997), hereby opposes the application ("Application") filed by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively "BellSouth") under Section 271(d) of the Communications Act of 1934 ("Communications Act"),[1] as amended by Section 151 of the Telecommunications Act of 1996 ("Telecommunications Act")[2] for authority to provide interLATA service "originating" within the BellSouth "in-region State" of Louisiana.[3] As TRA will demonstrate

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1 47 U.S.C. § 271(d).

2 Pub. L. No. 104-104, 110 Stat. 56, § 151 (1996).

3 An "in-region State" is "a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 271(i)(1).

below, BellSouth has failed not only to satisfy the threshold requirements set forth in Section 271(c) for Bell Operating Company ("BOC") provision of "in-region," interLATA service,[4] but has not demonstrated that grant of the authorization it seeks would be consistent with the public interest, convenience and necessity, as required by Section 271(d)(3)(C).[5] Given that the Commission cannot, therefore, make the affirmative findings required by Section 271(d)(3), TRA submits that the BellSouth Application cannot be granted. TRA, accordingly, urges the Commission to deny BellSouth the "in-region," interLATA authority it seeks here.

I.

INTRODUCTION

A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are or will soon be offering local exchange and/or exchange access services, generally through traditional "total service" resale of incumbent local exchange carrier ("LEC") or competitive

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[4] 47 U.S.C. § 271(c).

[5] 47 U.S.C. § 271(d)(3)(C).

LEC retail service offerings or by recombining unbundled network elements obtained from incumbent LECs, often with their own switching facilities, to create "virtual local exchange networks."[6] TRA's resale carrier members, accordingly, will not only be direct competitors of BellSouth in the local exchange, long distance and other markets, but will be reliant upon BellSouth as an incumbent LEC for wholesale services and access to unbundled network elements, as well as for exchange access services.

TRA's interest in this matter is in protecting, preserving and promoting competition within the interexchange market, as well as in speeding the emergence and growth of resale, non-facilities-based, and ultimately facilities-based competition in local exchange/exchange access markets within the State of Louisiana and elsewhere.[7] Permitting premature entry by any of the BOCs, including BellSouth, into the "in-region," interLATA market would jeopardize the vibrant and dynamic competition that now characterizes the interexchange market, and retard the emergence and development of competitive local exchange/exchange access markets. As the Commission has recognized, there are a host of ways in which control of local exchange/exchange

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6 TRA's most recent survey of its resale carrier members found that 33 percent were offering local exchange service; another 38 percent of TRA's resale carrier members reported that they would enter the local exchange market in 1998.

7 TRA was an active participant in the Louisiana Public Service Commission ("LPSC") proceeding addressing BellSouth compliance with Section 271(c) -- Docket No. U-22252, <u>In Re: Consideration and review of BellSouth Telecommunications, Inc.'s preapplication compliance with Section 271 of the Telecommunications Act of 1996, including, but not limited to, the fourteen requirements set forth in section 271 and provide a recommendation to the Federal Communications Commission regarding BellSouth Telecommunications, Inc.'s application to provide interLATA services originating in-region</u>.

"bottlenecks" can be leveraged by the BOCs and other incumbent LECs to disadvantage interexchange carrier rivals.[8] The Commission has further recognized that the BOCs and other

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[8] *See, e.g.,* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd. 21905, ¶¶ 7 - 13 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *pet. for rev. pending sub nom.* SBC Communications Corp. v. FCC, Case No. 97-1118 (D.C. Cir. Mar. 6, 1997), *remanded in part sub nom.* Bell Atlantic Tel. Cos. v. FCC, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand* FCC 97-222 (released June 24, 1997), *pet. for rev. pending sub nom* Bell Atlantic Tel. Cos. v. FCC, Case No. 97-1067 (D.C. Cir. July 11, 1997). As described by the Commission:

> If a BOC is regulated under rate-of-return regulation, a price caps structure with sharing (either for interstate or intrastate services), a price caps scheme that adjusts the X-factor periodically based on changes in industry productivity, or if any revenues it is allowed to recover are based on costs recorded in regulated books of account, it may have an incentive to allocate improperly to its regulated core business costs that would be properly allocated to its competitive ventures. . . . In addition, a BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets. For example, a BOC may have an incentive to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive. . . . Moreover, if a BOC charges other firms for inputs that are higher than the prices charged, or effectively charged, to the BOC's section 272 affiliate, then the BOC could create a 'price squeeze.' In that circumstance, the BOC affiliate could lower its retail price to reflect its unfair cost advantage, and competing providers would be forced either to match the price reduction and absorb profit margin reductions or maintain their retail prices at existing levels and accept market share reductions. This artificial advantage may allow the BOC affiliate to win customers even though a competing carrier may be a more efficient provider in serving the customer. Unlawful discriminatory preferences in the quality of the service or preferential dissemination of information provided by

[footnote continued on following page]

incumbent LECs can erect a variety of economic and operational barriers to competitive entry into, and competitive survival in, the local telecommunications market.[9]

[footnote continued from preceding page]

> BOCs to their section 272 affiliates, as a practical matter, can have the same effect as charging unlawfully discriminatory prices. If a BOC charged the same rate to its affiliate for a higher quality access service than the BOC charged to unaffiliated entities for a lower quality service . . . the BOC could effectively create the same 'price squeeze' discussed above.

Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd. 21905 at ¶¶ 10 - 12 (footnotes omitted).

[9] *See, e.g.,* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶¶ 10 - 23 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom.* Iowa Utilities Board v. FCC, 120 F.3d 753 (1997) ("Iowa Utilities Board"), *modified* 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997), *pet. for cert. pending sub. nom* AT&T Corp. v. Iowa Utilities Board (Nov. 17, 1997), *pet. for rev. pending sub. nom.,* Southwestern Bell Telephone Co. v. FCC, Case No. 97-3389 (Sept. 5, 1997). Among other things, the Commission has noted:

> An incumbent LEC . . . has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers. . . . Vigorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs. . . . This Order addresses other operational barriers to competition, such as access to rights of way, collocation, and the expeditious provisioning of resale and unbundled elements to new entrants. The elimination of these obstacles is essential if there is to be fair opportunity to compete in the local exchange and exchange access markets.

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶¶ 11, 16, 17.

As the Commission has acknowledged, monopolists do not readily relinquish market power; theoretically "contestable" markets cannot be miraculously transformed into actually "contested" markets overnight.[10] Unless there exists a potent countervailing incentive or disincentive to do otherwise, it can be anticipated that the BOCs, including BellSouth, and other incumbent LECs will actively seek to forestall local exchange/exchange access competition as a profit maximizing strategy. And given past practices, it can also be anticipated that the BOCS, including BellSouth, and other incumbent LECs will utilize their "bottleneck" control of exchange access facilities to disadvantage interexchange competitors.[11]

TRA submits that BOC and other incumbent LEC market conduct will be adequately disciplined only when viable facilities-based competition has emerged in the local exchange/exchange access market and that the only incentive that may be strong enough to motivate the BOCs to permit such facilities-based competitive entry is their desire to provide "in-region," interLATA services. As succinctly stated by the Commission:

> We find that incumbent LECs have no economic incentive, *independent of the incentives set forth in sections 271 and 274 of the*

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10 *See, e.g.,* id.

11 *See, e.g.,* United States v. Western Electric Co., 767 F.Supp. 308, 322 (D.D.C. 1991) ("Where the Regional Companies have been permitted to engage in activities because it appeared to the Court that the likelihood of anticompetitive conduct was small, they have nevertheless already managed to engage in such conduct . . .").

> *1996 Act,* to provide potential competitors with opportunities to services.[12]

Thus, the Commission reasoned, "Section 271 . . . creates a critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets."[13]

Hence, the public interest would not be served by sanctioning origination of interLATA traffic by BellSouth within the "in-region State" of Louisiana until the bulk of the residents of the State are able to select among multiple facilities-based providers of local exchange/exchange access service. In other words, BellSouth should not be awarded the authority it seeks here until it is facing viable facilities-based competition in at least the major population centers within the State of Louisiana. Certainly, BellSouth should not be granted such authority until the carrier has "taken real, significant, and irreversible steps to open . . . [its] markets [to competition" and those markets are indeed "open to competition."[14]

The Commission has an opportunity to realize the Congressional vision reflected in

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[12] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 55 (emphasis added). As the Chief Executive Officer of one BOC candidly acknowledged:

> The big difference between us and [the GTE] is they're already in long distance. What's their incentive to cooperate.

"Holding the Line on Local Phone Rivalry," The Washington Post, pp. C-12, C-14 (Oct. 23, 1996).

[13] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298, ¶ 14 (Aug. 19, 1997).

[14] Id.

the Telecommunications Act of an integrated, fully competitive telecommunications marketplace. That opportunity should not be lost by simply giving away the "carrot" relied upon by Congress to prompt "the opening [of] all telecommunications markets to competition."[15] As the Commission has recognized, "in the absence of . . . incentives . . . directed at compelling incumbent LECs to share their economies of scale and scope with their rivals, it would be highly unlikely that competition would develop in local exchange and exchange access markets to any discernable degree."[16]

II.

ARGUMENT

A. Procedures For Reviewing BOC Applications For "In-Region," InterLATA Authority Under Section 271

Within ninety days following submission by a BOC of an application to provide interLATA services originating (or in the case of inbound and private line services, terminating) within a State in which the BOC provides local exchange/exchange access service as an incumbent LEC, the Commission must issue a written determination approving or denying the application.[17] In undertaking that review, the Commission must consult with, and give "substantial weight" to the recommendations of the U.S. Department of Justice;[18] the Commission must also consult with the

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15 S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) ("Joint Explanatory Statement").

16 Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 18.

17 47 U.S.C. § 271(d)(3).

18 47 U.S.C. § 271(d)(2)(A).

telecommunications regulatory authority of the State that is the subject of the BOC application to verify the compliance of the applying BOC with the requirements for providing "in-region," nterLATA services set forth in Section 271(c),[19] although the State Commission's views are not dispositive as to these matters.[20]

The Commission may not grant a BOC application for "in-region," interLATA authority unless it makes an affirmative determination that the applying BOC has met the requirements of Section 271(c)(1) and (2) for the State for which authorization is sought, including: (i) a showing that either the BOC is providing, pursuant to one or more binding agreements approved by the State Commission under Section 252, access and interconnection to its facilities for the network facilities of one or more unaffiliated competitors that are providing telephone exchange services to residential and business subscribers exclusively or predominantly over their own landline telephone exchange service facilities, or, if no such unaffiliated facilities-based competitors have requested such network access and interconnection, the BOC is offering to provide such access and interconnection pursuant to a Statement of Generally Available Terms and Conditions ("SGATC") approved or permitted to take effect by the State Commission, and (ii) a demonstration that it has fully implemented in one or more access and interconnection agreements with facilities-based competitors or offered in a SGATC all fourteen items included on the "competitive checklist."[21] For

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19 47 U.S.C. § 271(d)(2)(A).

20 Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC 97-228, ¶ 15 (June 26, 1997), *pet. for rev. pending sub nom.* SBC Communications Corp. v. FCC, Case No. 97-1425 (D.C. Cir. July 3, 1997).

21 47 U.S.C. §§ 271(c), 271(d)(3)(A).

the Commission to determine that a BOC has fully satisfied the 14-point "competitive checklist," the BOC must have provided competitive LECs with (i) physical interconnection of network facilities at cost-based rates, (ii) nondiscriminatory access at cost-based rates to unbundled network elements, including local loop, local transport, local switching, and database and associated switching, as well as to poles, ducts, conduits and other rights of way, 911 and E911 service, directory assistance, operator call completion services and white pages directory listings, (iii) viable interim telecommunications number portability, (iv) local dialing parity, (v) reciprocal compensation arrangements, and (vi) opportunities to resell all retail service offerings at wholesale rates reflective of reasonably avoidable costs.[22]

Before granting a BOC application for "in-region," interLATA authority, the Commission must further make an affirmative determination that any authorization it grants to the applying BOC will be carried out in accordance with the structural and transactional requirements, nondiscrimination safeguards, audit obligations and marketing restrictions set forth in Section 272.[23] And critically, the Commission must find that grant of the requested in-region authority is consistent with the public interest, convenience and necessity.[24]

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[22] 47 U.S.C. § 271(c)(2)(B).

[23] 47 U.S.C. §§ 271(d)(3)(C); 272.

[24] 47 U.S.C. § 271(d)(3)(C).

B. BellSouth Has Failed To Make The Threshold Showing Required By Section 271(c)(1)

As noted above, a BOC seeking "in-region," interLATA authority pursuant to Section 271must make the threshold showing that it is either (i) facing actual facilities-based competition in the State as required by Section 271(c)(1)(A); or (ii) is entitled to proceed under Section 271(c)(1)(B) because it has not received a "qualifying request" from a "potential competitor . . . that, if implemented, . . . [would] satisfy section 271(c)(1)(A)."[25] BellSouth has made neither showing here. By its own admission, BellSouth is unable to demonstrate the presence of facilities-based competition in the State of Louisiana, other than providers of personal communications service ("PCS"), and thus cannot make the requisite "Track A" showing.[26]

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[25] 47 U.S.C. § 271(c)(1)(A) & (B); Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC 97-228 at ¶ 54.

[26] Brief in Support of Application of BellSouth for Provision of In-region, InterLATA Service in Louisiana at 17 - 20 ("BellSouth Brief"). Echoing arguments it made in support of its earlier filed application for "in-region," interLATA authority in the State of South Carolina, BellSouth once again seeks to enlist the Commission's assistance in documenting the existence and extent of facilities-based competition, urging the Commission "to direct all commenters on BellSouth's application to provide specific details regarding their own telephone exchange service operations, if any in Louisiana, including descriptions of all services now being offered and furnished, all steps currently being taken to enter the market, and timetables for introducing new services." Id at 17. The Commission has made clear that "the ultimate burden of proof with respect to factual issues [such as the existence of facilities-based competition] remains at all times with the BOC, even if no party opposes the BOC's application." Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 43. Further, the Commission has repeatedly stated its expectation that "a section 271 application, *as originally filed*, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings thereon." Revised Procedures for Bell Operating Company Applications under Section 271 of the Communications Act, FCC 97-330, p. 2 (Sept. 19, 1997) (emphasis added). Finally, noting that "the timing of a section 271 filing is one that is solely within the applicant's

[footnote continued on following page]

Further, BellSouth is a party to scores of binding interconnection agreements, many with carriers who stand ready and able, but for the continuing operational implementation obstacles which continue to characterize their dealings with BellSouth, to provide facilities-based service to both residential and business subscribers in Louisiana.[27] The BellSouth is thus precluded from seeking entry under "Track B."[28]

BellSouth, however, argues that it is entitled to proceed under "Track A" because three providers of PCS with which it has entered into network access/interconnection agreements -- *i.e.,* PrimeCo Personal Communications ("PrimeCo"), Sprint Spectrum and MereTel Communications ("MereTel") -- serve both residential and business customers over their own

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[footnote continued from preceding page]

control," the Commission has required a BOC, upon the filing of its application, to be "already in full compliance with the requirements of section 271 and submit[] with its application sufficient factual evidence to demonstrate such compliance . . . If, after the date of filing, the BOC concludes that additional information is necessary, or additional actions must be taken, in order to demonstrate compliance with the requirements of section 271, the BOC's application is premature and should be withdrawn." Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 55. BellSouth must shoulder its own burden here.

27 BellSouth Brief at 5 - 7.

28 BellSouth acknowledges, but disputes, the Commission's conclusion that a "qualifying request" must be a "request from a potential competitor . . . that, if implemented, will satisfy section 271(c)(1)(A)."Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC 97-228 at ¶ 54. Having so argued, BellSouth avers that "[d]epending upon the record facts gathered by the Commission in this proceeding, BellSouth might qualify as well under the Commission's interpretation of Track B, on the basis that no CLEC is taking 'reasonable steps' toward providing Track A service in Louisiana." BellSouth Brief at 21 - 22. As noted in footnote 29, *supra*, BellSouth carries the burden of presenting its case; the carrier cannot foist that responsibility off on either the Commission or other parties to the proceeding. Moreover, BellSouth's assessment of what constitutes "reasonable steps" do no accord with TRA's views..

networks. According to BellSouth, Congress intended to exclude only providers of cellular service, and not other wireless services, from the universe of potential facilities-based competitors. Moreover, BellSouth argues in the alternative, a facilities-based competitor's service offering need not be a meaningful commercial alternative to a BOC's local exchange service offering under Section 271(c)(1), or PCS constitutes such an economically comparable service offering. BellSouth is mistaken in all respects.

In "enact[ing] the sweeping reforms contained in the 1996 Act, . . . Congress . . . sought to open local telecommunications markets to *previously precluded competitors* not only by removing legislative and regulatory impediments to competition, but also by reducing inherent economic and operational advantages possessed by incumbents."[29] Congress established "Track A" as "the primary vehicle for BOC entry in section 271" in order to speed such previously foreclosed competitive entry into the local exchange market.[30] As proclaimed in the House Committee Report, the existence of a facilities-based competitive provider of local exchange service was thought to constitute "tangible affirmation that the local exchange is indeed open to competition."[31]

Wireless carriers do not fall into the universe of "previously precluded competitors." Entry by wireless carriers into the local market was not facilitated by "remov[al] of legislative and regulatory impediments." "[E]limination of economic and operational barriers to entry" was not

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[29] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 13 (emphasis added).

[30] Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC 97-228 at ¶ 41

[31] H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 76 - 77 ("House Report").

necessary to allow for local market entry by wireless carriers.[32] Provision of wireless service is not "dependent . . . upon the BOCs' cooperation in the nondiscriminatory provisioning of interconnection, unbundled network elements and resold services pursuant to the pricing standards established in the statute."[33] Indeed, wireless carrier entry into the local market would have occurred in a "situation . . . largely unchanged from what prevailed before passage of the 1996 Act," with or without compliance by the BOCs with the "competitive checklist."[34]

It is obviously because Congress intended for the requirements of "Track A" to have meaning that it expressly excluded from the telephone exchange services a qualifying facilities-based competitor must be providing, or intending to provide, "services provided pursuant to subpart K of part 22 of the Commission's regulations."[35] Congress was aware that all state and local barriers to the provision of cellular service have long been removed and that BOC cooperation was not necessary to facilitate market entry by cellular carriers. BellSouth would have us believe, however, that Congress singled out only providers of cellular service for this assessment, thereby implicitly acknowledging that all other wireless service providers would constitute facilities-based carriers under Section 271(c)(1)(A). This "all other group" would apparently include not only PCS, but traditional mobile telephone service, certain 800 MHZ and 900 MHZ specialized mobile radio service ("ESMR"), and perhaps even such narrowband services as 220 MHZ and business radio

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32 Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 11

33 Id. at ¶ 14.

34 Id. at ¶ 18.

35 47 U.S.C. § 271(c)(1)(A).

services. The presence of these wireless service providers would not establish that local exchange markets had been opened to competition, because providers of services such as traditional mobile telephone have been fixtures in the local market years before the Telecommunications Act was enacted and providers of PCS and ESMR services could have entered the local market whether or not the Telecommunications Act had not been enacted. Congress clearly meant to exclude all wireless carriers, not merely cellular service providers, from the universe of "Track A" qualifying carriers.

Confirming this view are critical differences between wireless and wired services which prevent the former from providing a meaningful competitive alternative to the latter. TRA does not disagree that Congress and the Commission have recognized that cellular, PCS and ESMR carriers offer exchange and exchange access service.[36] Both Congress and the Commission, however, declined to classify any of these wireless providers as local exchange carriers.[37] The Commission declined to so classify wireless providers because "wireless local loops have [not yet] begun to replace wireline local loops for the provision of local exchange service."[38] Certainly, the Commission has recognized that wireless services could "potentially extend, replace, and compete with wireline local exchange services."[39] Indeed, in allowing wireless "licensees to offer fixed services over CMRS spectrum," the Commission sought to "establish a framework that will

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[36] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 1004.

[37] Id.

[38] Id. at ¶ 1005.

[39] Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, 11 FCC Rcd. 8965, ¶ 6 (1996).

stimulate wireless competition in the local exchange market."[40] It nonetheless determined that it would be premature to determine regulatory treatment of such competitive offerings because they have yet to emerge.[41]

Thus, the Commission has recently concluded that "fixed wireless service has developed to the point where it has *the potential* to provide a competitive alternative to the incumbent LEC network."[42] Indeed, the Commission has released a *Notice of Inquiry* to "explore means of encouraging and facilitating competition in the local exchange telephone market" by wireless service providers, with the stated intent of "develop[ing] a record for determining whether the wider availability of [Calling Party Pays] CPP would enable CMRS providers to more readily compete with wireline services provided by LECs."[43] As the Commission explained, "[a] fundamental difference between wireline and wireless service is that currently a U.S. wireline telephone subscriber does not pay any additional charges to receive telephone calls, whereas most CMRS telephone subscribers pay a per minute charge to receive calls."[44] While the Commission

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40 Id. at ¶ 3.

41 Id. at ¶¶ 46 - 57.

42 Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, FCC 97-352, ¶ 54 (Oct. 3, 1997) (emphasis added).

43 Calling Party Pays Service Option in the Commercial Mobile Radio Services, WT Docket No. 97-207, FCC 97-341, ¶ 1 (Oct. 23, 1997)

44 Id. at ¶ 2.

theorized that widespread use of CPP might narrow these differences, it noted that CPP is not broadly available and is not available at all in the State of Louisiana.[45]

BellSouth's claim that PCS is a meaningful alternative to wireline local exchange service is simply not credible, not only because of the distinctions identified above by the Commission in the context of CPP, but on a more fundamental cost basis. Consumers of wireless services pay for virtually all calls, including, as noted above, calls placed to them and, critically, calls which are toll free for wireline local exchange users. Thus, a PCS subscriber will pay airtime charges in conjunction with calls placed to "800" and "888" numbers, whereas a wireline local exchange customer will not be charged for such calls. Moreover, BellSouth's protestations to the contrary notwithstanding, the PCS subscriber will pay a substantially higher per-call or per-minute rate than the wireline local exchange customer for placing a call.

The analysis of PCS versus wireline local exchange service pricing provided by BellSouth lists per-minute pricing of $0.26 to $0.40 for PCS, well in excess of message rate wireline local exchange charges.[46] While promotional pricing may periodically produce lower per-minute rates, such promotional rates are generally tied to high monthly charges which require large volumes of usage. And in the wireless environment, monthly charges must be paid even if incorporated minutes are not used. Moreover, "flat-rated" services -- *i.e.*, services that provide unlimited calling for a fixed monthly fee -- comparable to those in the wireline local exchange world are simply not avialable in the wireless environment.

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45 Id. at ¶¶ 6, 8.

46 BellSouth Application, Appx. D, Tab 6 (Affidavit of Aniruddha Banerjee), p. 3.

It is noteworthy that the only way that BellSouth could lay claim to any comparability in pricing between PCS and wireline local exchange service was to enhance a basic service offering with a number of "bells and whistles." Thus, BellSouth bundles into the wireline local exchange rate not only short-haul long distance, but such vertical features as call waiting, caller ID, call forwarding, 3-way calling and voice mail. As BellSouth concedes, "there is no point in comparing . . . PCS . . . with the cost of BST's 1FR service by itself since that service includes neither toll calls nor vertical services."[47] In other words, the only way to create comparability between wireline local exchange service and PCS is to transform the former into a high-end service. And even having so jerry-rigged the analysis, the best BellSouth can claim is that pricing is comparable only for a narrow segment of users -- *i.e.*, those with 30 to 50 minutes of combined incoming and outgoing calls a month -- or the consumers least likely to attach a host of "bells and whistles" to their telephone service.

Obviously recognizing the weakness of its pricing comparability showing, BellSouth also provides the results of a survey which purports to establish that consumers are replacing wireline local exchange service in whole or in part with PCS service.[48] Given the inherent incredibility of these contentions, particularly in light of the pricing differences discussed above, it was incumbent upon BellSouth to provide comprehensive supporting documentation in conjunction with its survey results. At a minimum, the questionnaire which produced these unlikely responses should have been provided. More critically, the likely answers should have been probed further to determine their context. It advances the record little to include facially questionable data without

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[47] Id. at 4.

[48] BellSouth Application, Appx. D, Tab 5 (Affidavit of William Denk), p. 4.

documentation or analysis. Certainly, BellSouth has not carried its burden of proof in this regard. As the Commission has made clear, "the ultimate burden of proof with respect to factual issues remains at all times with the BOC, even if no party opposes the BOC's application."[49]

In short, while the Commission "envision[s] PCS providers offering a broad array of services, including services that could potentially extend, replace, and compete with wireline local exchange service,"[50] that day has not yet arrived. Moreover, if and when it does, it will reveal nothing with respect to BOC compliance with Congressional directives to open their local exchange/exchange access markets to competition. BellSouth should not be permitted to so easily avoid its statutory responsibilities.

C. BellSouth Has Not As Yet Fully Satisfied The 14-Point "Competitive Checklist"

A BOC that seeks "in-region," interLATA authority must demonstrate that it has "fully implemented the competitive checklist" if proceeding under Track A or has "generally offered" in a SGATCs "all items included in the competitive checklist," if proceeding under Track B.[51] Under either Track A or Track B, the network access and interconnection made available by the BOC must encompass each of the fourteen items incorporated into the Section 271(c)(2)(B) 14-point

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[49] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 43.

[50] Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, FCC 97-352, ¶ 6.

[51] 47 U.S.C. § 271(d)(3)(A).